No. 08-5538

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALICIA PEDREIRA, KAREN VANCE, PAUL SIMMONS, JOHANNA W.H. VAN WIJK-BOS, and ELWOOD STURTEVANT,
Plaintiffs-Appellants,

v.

KENTUCKY BAPTIST HOMES FOR CHILDREN, INC.; ROBERT STEPHENS, Secretary, Justice Cabinet; JANIE P. MILLER, Secretary, Commonwealth of Kentucky Cabinet for Health and Family Services,
Defendants-Appellees.

On Appeal from the United States District Court
For the Western District of Kentucky

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendant-Appellee Kentucky Baptist Homes for Children, Inc.,
Supporting Affirmance

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Amicus Curiae The National Legal Foundation has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

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INTEREST OF THE *AMICUS*

The National Legal Foundation (NLF) is a 501(c)(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. The NLF has gained valuable expertise in the area of First Amendment law, which it believes will assist this Court in deciding this case. The NLF has an interest, on behalf of its constituents and supporters, including those in Kentucky, in arguing on behalf of people of faith.

This brief is filed pursuant to consent from Counsel of Record for the Appellants and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*.

SUMMARY OF THE ARGUMENT

This Brief makes one argument not made by the Appellees. *Amicus* argues that, assuming *arguendo* Pedreira, *et al.* (hereinafter "Pedreira") are correct that the analysis for determination of state taxpayer standing is different from the analysis for federal taxpayer standing, Pedreira's attempt at an alternative standard still fails to establish her standing.

The Brief explains that under *Doremus v. School Board of the Borough of Hawthorne*, 342 U.S. 429 (1952), Pedreira has failed to allege that the disputed taxpayer funds have been occasioned solely by the alleged wrongful activity.

Rather, because the money would have been spent regardless of whether Kentucky Baptist Homes for Children, Inc. (hereinafter "KBHC") received it, Pedreira's argument for standing fails under *Doremus*.

ARGUMENT

Your *Amicus* agrees with the analysis of the court below and the arguments presented by KBHC and the Commonwealth Defendants/Appellees[1] (hereinafter the "Commonwealth")—in particular that *Hein v. Freedom from Religion Found., Inc.*, 127 S. Ct. 2553 (2007); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); and *Flast v. Cohen*, 392 U.S. 83 (1968) support the denial of both federal and state taxpayer standing to Pedreira. Furthermore, your *Amicus* disagrees with Pedreira's argument that a separate test for state taxpayer is necessary to evaluate state taxpayer standing. However, assuming *arguendo* that Pedreira is correct that the *Flast* "legislative nexus" test is inapplicable to state taxpayer standing, Pedreira still cannot show that Kentucky's funding of KBHC satisfies *Doremus*.

[1] The Commonwealth Defendants/Appellees include Robert Stephens (now deceased), Secretary of the Commonwealth of Kentucky Justice Cabinet (hereinafter "JC") and Janie P. Miller, Secretary of the Commonwealth of Kentucky Cabinet for Health and Family Services (hereinafter "CHFS").

I. EVEN IF *HEIN*, *CUNO* AND *FLAST* ARE NOT DIRECTLY APPLICABLE FOR STATE TAXPAYER STANDING, PEDREIRA STILL LACKS STATE TAXPAYER STANDING BECAUSE SHE CANNOT SHOW THAT THE STATE FUNDS ARE SPENT SOLELY ON THE CHALLENGED ACTIVITY.

The court below correctly found that the Pedreira lacked Article III standing under *Hein*, *Cuno* and *Flast* as to both federal and state taxpayer status. *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 553 F. Supp. 2d 853, 855-56 (W.D. Ky. 2008). KBHC and the Commonwealth have adequately and cogently argued why the lower court's holding was correct. In particular, KBHC and the Commonwealth correctly refute Pedreira's argument that the relevant test for state taxpayer standing is different from the test for federal taxpayer standing. (KBHC Br. 23-45; JC Br. 6-16; CHFS Br. 13-39.) Your *Amicus*, however, will demonstrate that, even assuming *arguendo* that Pedreira is correct that the test for state taxpayer standing is different from the test for federal taxpayer standing, Pedreira is *incorrect* in her presentation of the test and its application to the instant case.

A. For Pedreira to statisfy the requirements for state taxpayer standing under *Doremus*, she must demonstrate, *inter alia*, that the alleged funds were spent solely for the challenged activity.

Pedreira argues that no "nexus" between a "challenged expenditure and legislative action" is required to demonstrate state taxpayer standing. (Appellants' Br. 37-40.) In so doing, she oversimplifies the demands for state taxpayer

standing, relying primarily upon *Johnson v. Economic Development Corp. of the County of Oakland*, 241 F.3d 501 (6th Cir. 2001). Although *Johnson* correctly found *Doremus* controlling, 241 F.3d at 507, as will be demonstrated below in part B, its analysis was limited to an aspect of standing not in dispute in the instant case.

In *Doremus*, a parent and other citizens sought to have a statute authorizing the daily reading of Old Testament scriptures in a public school declared unconstitutional. *Id*. at 430. In so doing, they sought standing as, *inter alia*, state taxpayers. *Id*. at 432. The Supreme Court rejected this standing argument for several reasons.

The *Doremus* Court noted that the complaint did not "show a measurable appropriation or disbursement of . . . funds occasioned solely by the activities complained of." *Id*. at 434. After noting that, in a case involving taxpayer standing, the injury complained of had to be a "direct pecuniary" one, *id*., and that the case itself had to be a "good-faith pocketbook action," *id*., the Court summed up its concern in the following manner:

> It is apparent that the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference. If appellants established the requisite special injury necessary to a taxpayer's case or controversy, it would not matter that their dominant inducement to action was more religious than mercenary. It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct. We find no such direct and particular financial interest here.

> If the Act may give rise to a legal case or controversy on some behalf, the appellants cannot obtain a decision from this Court by a feigned issue of taxation.

Id. at 434-35.

Other courts of appeals have expounded upon *Doremus's* requirements. In particular the Ninth Circuit's *en banc* opinion in *Doe v. Madison School District No. 321*, 177 F.3d 789 (9th Cir. 1999), summarized how various courts of appeals had applied *Doremus* up to that time. The *Doe* court identified four important aspects of the application of *Doremus*. First, the plaintiff seeking state taxpayer standing must show that he is a taxpayer. *Id*. at 795 (quoting *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 408 (5th Cir. 1995)). Second, the taxpayer must show that the alleged funds are spent solely for the challenged activity, *i.e.*, that the funds would not otherwise be spent. *Id*. at 793-94. The *Doe* court specifically mentioned that maintenance costs for an area around a crucifix that would have to be maintained absent the crucifix was not money spent solely on the cross. *Id*. at 795-96 (citing *Gonzales v. N. Township*, 4 F.3d 1412, 1416 (7th Cir. 1993)). Third, the plaintiff must show a specific amount of funds that have been expended. *Id*. at 794. Fourth, the expenditure must be significant and not merely incidental. *Id*. at 796.[2]

[2] To avoid confusion, it should be noted that the second and fourth elements often are analyzed together. However, they are analytically distinct. For example, one can easily imagine an expenditure that might be very large, but that is not used

Here, although Pedreira, as a citizen and taxpayer of Kentucky, can arguably meet three of the *Doremus* elements, she has not and cannot demonstrate that such monies were "occasioned solely" for the challenged activities, as *Doremus* requires, 342 U.S. at 434. Pedreira, for her part, argues that *Johnson* only requires allegations of "a government expenditure of funds," *or* a "measurable appropriation," *or* "a loss of revenue." (Appellants' Br. 38 (quoting *Johnson*, 241 F.3d at 507-08) (emphasis added in Pedreira's brief).) Such a view of *Johnson* misapprehends its holding, leading to Pedreira's incorrect application of it to the instant case.

B. ***Johnson's*** **narrow holding is of limited value to resolution of state taxpayer standing in the instant case because it analyzed a different element of *Doremus* than what is at issue here.**

Pedreira points to this Court's holding in *Johnson* as dispositive of the state taxpayer standing question. (Appellants' Br. 37-38.) Pedreira's characterization of *Johnson*, however, misapplies its true holding—namely that this Court was

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solely for the allegedly unconstitutional purpose. Indeed, that is the situation presented by the instant case. Similarly, one could imagine an expenditure that is used solely for the allegedly unconstitutional purpose, but which is very small. To further avoid confusion, it should be noted that many courts use the original "measurable appropriation" language from *Doremus*, 342 U.S. at 434 to analyze the second element, while other courts use that term to analyze the fourth element and yet others use it to analyze both. *See, e.g., Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620,639 (1st Cir. 1990); *District of Columbia Common Cause v. District of Columbia,* 858 F.2d 1, 8 (D.C.Cir. 1988); *Hoohuli v. Ariyoshi,* 741 F.2d 1169, 1178 (9th Cir. 1991); *Altman v. Bedford Cent. Sch. Dist*., 245 F.3d 49, 73 (2d Cir. 2001). This Court in *Johnson* appeared to use "measurable appropriation" in this ultimate sense. *Johnson*, 241 F.3d at 508.

evaluating the third prong under *Doremus* and not the second. This difference is critical and fatal to Pedreira's state taxpayer claim.

In *Johnson*, a Michigan state taxpayer sued a legislatively created organization whose purpose was to administer a tax-exempt bonds program in an attempt to encourage economic development within Michigan. The plaintiff based his suit on the theory that the organization had violated the Establishment Clause when it approved and issued bonds for a construction project for a Roman Catholic school. *Johnson*, 241 F.3d at 504-06.

When the defendant argued that the plaintiff lacked standing to bring the case, this Court narrowed its analysis to "whether [the p]laintiff has alleged the requisite financial interest" under *Doremus*. *Id.* at 507. In particular, this Court's inquiry was limited to "whether a loss of revenue is sufficient to establish a financial interest under *Doremus*." *Id.* The defendant contended that the financial interest contemplated by the *Doremus* court was of necessity an expenditure of funds rather than a loss of revenue. *Id.* This Court disagreed and found no basis under *Doremus* to distinguish between an expenditure and a loss of revenue in determining the "'good-faith pocketbook injury.'" *Id.* (citation omitted).[3]

Thus, this Court's discussion in *Johnson* was confined to the third element under *Doremus*, as the other three elements were clearly met. First, the plaintiff

[3] The narrow nature of this Court's holding in *Johnson* is also argued in some detail in CHFS's brief. (*See* CHFS Br. 38.)

was a Michigan taxpayer. Second, every dollar *not brought into* Michigan's treasury through the tax-exempt bonds secured by the religious school was a calculable loss to the state. In other words, the funds (*i.e.*, the loss of tax revenues) were spent (*i.e.*, not available for use in the state's treasury) solely for the challenged activity (*i.e.*, completely attributable to the religious school's use). *See Doremus*, 342 U.S. at 434. Finally, the loss of revenue amounting to nearly $70,000 was clearly not incidental. *Johnson*, 241 F.3d at 506. And because *Doremus* made no distinction between an expenditure and a loss of revenue, all four *Doremus* elements were present to provide the *Johnson* plaintiff standing. Because the third prong at issue in *Johnson* is not at issue here, *Johnson* is of limited applicability to the instant case. As set out more fully below, it is Pedreira's failure to satisfy the second prong under *Doremus* that proves fatal to her alternative state taxpayer standing argument. (*See* Appellants' Br. 37-40.)

C. Pedreira lacks standing because the funds paid to KBHC were not occasioned solely by the alleged wrongful activity as required by *Doremus*.

As KBHC and the Commonwealth have amply demonstrated, the tax dollars identified in this case are not used directly for religious activities and do not meet the requirements for taxpayer standing as set forth in *Doremus*. (KBHC Br. 2-3; JC Br. 2-4; CHFS Br. 6-9.) Because the expenditures cited by Pedreira in this case

fail to meet at least the second element set forth in *Doremus*, Pedreira is thus unable to demonstrate state taxpayer standing.

Rather, the tax dollars spent in the present case are, in fact, funds that would have been spent anyway. The tax dollars involved in this case are analogous to those complained of in *Gonzales*. In *Gonzalez*, 4 F.3d at 1414, taxpayers claimed standing to challenge a memorial featuring a crucifix located in a public park. Taxpayers claimed that they had standing to challenge the memorial because public funds were used to maintain the park. However, the Seventh Circuit held that the taxpayers lacked standing because the funds identified would have been used to maintain the park grounds even if the crucifix were not present. *Id.* at 1416.

Here, the funds allocated by the Kentucky legislature and distributed by Executive branch agencies were funds required to meet the needs of troubled Kentucky youth, (KBHC Br. 2-3), and would have been spent by some agency, whether KBHC or another. *See Gonzales*, 4 F.3d at 1416. Put differently, the cost of paying the support costs for the youth will remain relatively static in that the youth are in the program independent of KBHC's existence. What is variable is who provides the care, and thus receives the funding. If one assumes that KBHC ceases to exist, every penny it would have received would necessarily go to a different organization to fill the needs of the state's youth. Furthermore, it defies

reason to believe that KBHC would have spent state funds exclusively on "challenged activities." Instead, as has been described by KBHC, payments are made to agencies like KBHC after they have incurred the costs and only for basic, non-religious expenses. (*See* KBHC Br. 11-18.) Pedreira has not alleged, nor could she, that *all* of KBHC's activities are properly classified as "challenged," unless Pedreira is attempting to challenge the propriety of state payments for the youths' basic necessities.

Notably, this "second prong" under *Doremus* has been analyzed repeatedly for the purposes of state taxpayer standing in the federal courts. *See Hinrichs v. Speaker of the House of Representatives*, 506 F.3d 584, 588 (7th Cir. 2007); *Arakaki v. Lingle*, 423 F.3d 954, 971 (9th Cir. 2005), *aff'd in pt., rev'd in pt.*, 477 F.3d 1048 (9th Cir. 2007); *Altman*, 245 F.3d at 72-73; *Freedom from Religion Foundation, Inc. v. Olson*, No. 1:07-cv-043, 2008 U.S. Dist. LEXIS 58439, at *27-28 (D.N.D. Jul. 16, 2008); *Novesky v. Goord*, No. 03-0198, 2005 U.S. App. LEXIS 465, at **4-5 (2d Cir. Jan. 11, 2005). These cases, although sometimes factually dissimilar and analytically distinct, demonstrate the ongoing vitality of *Doremus's* second element in evaluating state taxpayer standing. Although the second element is sometimes passed over when not relevant to the court's analysis, *see, e.g., Johnson*, 241 F.3d at 508-09, it nonetheless is evaluated as part of state

taxpayer standing analysis when appropriate, and consequently proves fatal to Pedreira's attempt to argue an alternate basis for state taxpayer standing.

CONCLUSION

For the foregoing reasons, as well as those presented by KBHC and the Commonwealth, this Court should affirm the decision of the District Court and to dismiss for lack of taxpayer standing.

Respectfully submitted
This 30th day of September 2008

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CERTIFICATE OF COMPLIANCE

Counsel for *Amicus Curiae* The National Legal Foundation certifies in accordance with F.R.A.P. 32(a)(7)(B) that this brief contains 2,516 words of Times New Roman (14 point font) proportional type as calculated on the word count function of Microsoft Office Word 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2008, I electronically filed the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Pedreira, et al., v. Ky. Baptist Homes for Children, Inc., et al.*, No. 08-5538, with the clerk of the court by using the CM/ECF system. I further certify that the following were served either by electronic CM/ECF notification or by first class mail:

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